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ABSTRACT

Although schools cannot actively promote religiously-oriented activity, neither can they prohibit such activity. The 98th Congress passed the Equal Access Act in an attempt to ground students' rights to practice religion in the schools in well-established constitutional principles requiring equal treatment, protecting student-initiated meetings, and preserving local control of schools. This paper reviews a number of legal issues associated with implementation of the new law, drawing on federal court cases as examples of the problems faced and ways in which those problems may be resolved. Among these issues are the extent to which schools are justified in limiting student activities, and under what circumstances; the extent to which participation in such activities by staff members may be construed as state support or approval; the form to be taken by official responses to violations of the new law; and the ability of students to make mature decisions concerning participation in religiously related activities. (PGD)

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The Equal Access Law: One Nation Under God?

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With the passage of Public Law 98-377, known as the Equal Access Act, President Reagan and Congress set the stage for the vigorous debate of several issues that faced Supreme Court scrutiny. Many of the controversies surrounding some of the precepts of the law were believed to have been already settled by the courts. The extension of civil rights protection to secondary school students inevitably pitted Congress against the Constitution. However, the Supreme Court declined to decide whether the Constitution permits voluntary school prayer, the central principle of the law.

The Supreme Court, in March 1986, avoided the issue with which it was presented, dismissing the case on the basis of a technicality. A survey of the passage and implementation of the Equal Access Act, however, elucidates the importance that a potential Supreme Court decision could have for the issue of religion in the secondary schools. As will be discussed here, there are several issues which present school systems with problems likely to lead to extensive litigation.

As it became apparent that passage of the popular Math/Science Bill (S.1285) was contingent upon the inclusion of the Equal Access Act as an amendment, several interested organizations combined their efforts to clarify the meaning of the constituitonal law. (1) The Congressional intent in passing the Equal Access Act was to develop legislation that

respects both the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment, so that secondary school students may organize meetings. (2) As explained in the Equal Access Guidelines, the law clearly acknowledges "the constitutional prohibition against state-sponsored religious activities...", goes on to express a belief that student-initiated speech not be prohibited, affirms the right and responsibility of local school boards and administrators to implement equal access in conformity with the Act and the Constitution, and finally notes that it was not its intention to prohibit any activity that is otherwise constitutional. (3) Attempts were made to ground the law in areas which have stood the tests of the courts and have a constitutional or philosophical basis. Principles which are basic to the guidelines are: equal treatment, protection of student-initiated meetings, and preservation of the individual school's right to local control.

Thus, permeated with noble guidelines and constitutional intentions, Congress has, with the ratification of this Act, maintained that the practice of religion in the school is legal. Although a school cannot actively promote religiously-oriented activity, neither can it prohibit such activity. Hence religion is re-introduced into the school setting through a type of "back door" Congressional legislation. It appears, though, that the

legislation prohibits discrimination against those who wish to practice religion much more than it promotes religious activity.

The First Amendment's guarantee of freedom of speech and the Fourteenth Amendment's guarantees of equal protection and due process protect students' rights to gain school access for any type of activity unless a compelling government interest conflicts with and overrides these rights. (4) With respect to the equal treatment precept of the Equal Access Act, proponents confronted the issue of opening the schoolhouse doors in an equitable fashion for all by tailoring the law to prohibit discrimination against such student-initiated meetings "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." (5) Since the issue of religion in the school is the most explosive of the three stated intents, it is this idea that has generated the controversy.

While the Supreme Court has yet to develop a position on student-initiated religious activities, the high court has declared unconstitutional activities of a religious nature which are state-initiated or sponsored. A legal clash is certain between the proponents of religious activity based on the students' rights to free speech and the proponents of a rigid separation of church and state.

One of the law's main features, preservation of local control, supports a concept considered close-to-the-hearts

of boards, superintendents, and building administrators across the country. In its present form the law outlines the few restrictions which actually apply to local control if a school division chooses to adopt a policy permitting non-curricular related meetings to take place on school premises. The President and Congress respected the position that localities must retain the prerogative of representing the best educational policy for the school district.

As with most legislation, however, the apparent simplicity of the law on paper does not transfer to simplicity of implementation. Local education agencies across the nation must become aware of the problems inherent in this legislation. Established legal positions may help schools through the decision to tolerate controversy but not disruption. These decisions may be useful in determining to what extent the Act may inadvertently incite disruption in the school. Also, several suggestions have been put forth as to whether a school district should subscribe or not subscribe to the Equal Access Act, and to the federal requirements thereof. Finally, a flurry of interpretations of the Act continue to point toward a showdown between Congress and the Constitution.

Under a Supreme Court decision in the case of Perry Educational Association v. Perry Local Educational Association, the court cleared a path for the boards to follow through First Amendment Law. (6) The decision held

that officials may regulate the content of expression in a public forum only if the regulation is narrowly tailored to serve a compelling interest of the board. Such restrictions must be guided by clear and precise board standards to prevent censorship of views solely on the basis that school officials disagree with those views. This case, while dealing with teacher organizational recognition, supports a tenet of the Equal Access Act in that school boards may not regulate expression merely because the board disagrees with the opinions being expressed. Schools, in other words, need not tolerate disruption but they must tolerate controversy. (7) Moreover, administrators must be extremely careful to distinguish between those organizations having lawful but unpopular goals and those having explicitly unlawful goals (Gay Activists Alliance V. Board of Regents, Oklahoma Supreme Court, 1981). (8). Herein lies a potentially explosive issue as concerns the Act. Some school administrators claim that the inclusion of religion in any way with the school will lead to problems of control and ultimately participation by the school in the conduct of religious activity. Will the school day be disrupted if, during the time set aside for the "limited open forum" of student activities, a religious group tries to recruit other students actively? No teacher may be involved, yet other students may be subject to undesired religous pressure. Is there thus a "compelling interest" on the part of the board?

Local school boards and principals are handed yet another set of circumstances by the Equal Access Act, requiring that the administrators review their options and then make a basic decision to subscribe or not to subscribe to the provisions of the law. The law does not require schools to change their policies if they already prohibit student groups from meeting or to limit activities or close an existing limited open forum. (9) (Bender v. Williamsport Area School District, 53 L.W. 2067r, 1984) School districts choosing not to provide a limited open forum will have to justify the existence of their sanctioned curricular activities. The implied message here is that if a school is so opposed to religious activity, it may revoke any sort of student organization. In this instance, not only would the supposedly constitutional right to student-sponsored religious activity be prohibited, but any student's right to any activity would be prohibited. To put it bluntly, if the school dictates that Christian students cannot meet to read the Bible or Moslem students the Koran, then the cheerleaders cannot meet to raise money for new uniforms. An extreme possibility, perhaps; nonetheless, one must consider all possibilities before instituting potentially harmful legislation.

Furthermore, districts wanting to allow noncurricular-related student meetings must allow a voluntary and student-initiated forum. No employee can be

compelled to attend a meeting, but staff presence at the meeting is permissible. (10) Here again one faces the fine line dividing a student-sponsored religious meeting from a state-sponsored religious function. If a student observes a teacher, a role model, at such a meeting, might he not consider that the school advocates such activity? One wonders, then, where constitutionality of the situation begins and ends.

On a still more practical level, one may wonder what sanctions, if any, face a local school division if the guidelines of P.L. 98-377 are violated. Some confusion erupts here, primarily because of the implication contained in Section 802.(a), "It shall be unlawful for any public secondary school which receives Federal Financial Assistance and which has a limited open forum to deny equal access..." (11) While any public school failing to adopt the principles of this act may thus ostensibly face the loss of federal funding, this specific concern is refuted in Sec.802.(e), "...nothing in this title shall be construed to authorize the United States to deny or withhold Federal Financial Assistance to any school." (12) Where is the compulsion, then, to develop local guidelines which are in compliance with the Act? Do the legislators have doubts about the constitutionality of such a law that the law is optional? Is it merely a device to test the mood of the country concerning religion? When Congress passes a law,

all parties involved under that law are supposedly governed thereby. In allowing a school to decide for itself if it wishes to participate with the law, and by assuring those schools who do not that no reprisals will occur, this law seems to transcend any notion of "illegality". If a violation or failure to comply with a law is not illegal, is the law itself legal? School board chiefs and board attorneys are recommending, nevertheless, that local boards have their positions set and, where applicable, regulations or policies in place. There exists a sense of forced moral responsibility to comply with the law while a precedent-setting ruling by the U.S. Supreme Court has not been rendered. Even more importantly, however, the burden of ambiguous implementation is placed upon the schools until such a decision comes.

Simultaneously, perhaps unwittingly, Congress and the nation's court system established legal standards in the summer of 1984 relating to the rights of students to form extra-curricular clubs. Congress, with the passage of the Equal Access Act, has hammered out the concerns voiced by only some of the constitutional interpretists. The Third U.S. Circuit Court of Appeals reversed a lower court decision and ruled that the Establishment clause of the First Amendment bars extra-curricular religious clubs in public schools in Bender v. Williamsport Area School

District. The Third U.S. Circuit had followed the hint left by the analysis of the 1981 case Widmar v. Vincent, in the U.S. Supreme Court. From this higher education case, the High Court observed that "college students are more mature than younger students." (13)

In the 1986 non-decision four dissenting judges invoked Widmar. Although he wrote for the majority, Justice John Paul Stevens emphasized that each case dealing with school prayer had to be considered separately. He commented that "a slight change in the facts could very well have dictated a contrary decision." (14) One is left wondering if a fourteen-year-old is expected to execute a mature judgment at all times.

The second, fifth, and eleventh U.S. Circuits have handed down decisions which similarly clash with the Equal Access Act. As a result of these legal conflicts, it should appear plausible to give student political and philosophical groups equal access to school facilities. The sticky constitutional issue remains, "What to do with religous groups?"

The fact remains, though, that the question of "what to do with religious groups?" is asked of secondary schools, not of colleges where the students are adults. Comprised of seemingly clear, commendable guidelines intended to benefit the student, the issue becomes entangled with the archetypal hornet's nest of religion associated with the school. Yet

with the Supreme Court's failure to rule on the Equal Access Act, the issue continues to be clouded. The questions remain unanswered: Is it legal for a school to prohibit the Moslem from reading the Koran while condoning a meeting of the International club? Conversely, is it legal for the school to have a religously-oriented gathering which may influence another student against his or her parents' wishes? The Court ruled unequivocally in 1961 that religion had no place in the school. This ruling has been challenged by the U.S. Supreme Court's dismissal on the technicality of an invalid appeal. The issues, thus, are unresolved. Local school officials are left to answer the broad question: does this indecision render us one nation under God?

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